Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

Appellant,

v.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK.

On Appeal from the Court of Appeals of the State of New York

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

OSMOND K. FRAENKEL,
EMANUEL REDFIELD,
NANETTE DEMBITZ,
Counsel for New York Civil Liberties Union, amicus curiae.

August, 1955

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Interest of New York Civil Liberties Union as *Amicus Curiae*

The New York Civil Liberties Union is submitting this brief with the written consent of both parties, filed with the Clerk of this Court. An affiliate of the American Civil Liberties Union, it is a non-partisan organization devoted solely to the protection and advancement of civil liberties in situations arising in New York City and its environs. Its exclusive concern is civil liberties: it has no other platform or program, political, economic, or otherwise.

The New York Civil Liberties Union is interested in the instant case because it believes this Court's reversal of the decision here in issue would erect an important bulwark

against the attack impinging from all sides on the privilege against self-incrimination. We believe that the maintenance of this privilege in its full stature is essential to the dignity and liberty of the individual in his relations with his Government and to his protection from oppression and injustice at the hands of over-eager, but under-conscientious, officials. A provision like the New York City Charter section as here interpreted, offers a ready means for destruction of the value of the privilege for one group of citizens after another.[1]

The New York Civil Liberties Union further believes that this Court's invalidation of appellant's discharge and disqualification from employment is important to the preservation of civil liberties because it was in essence bottomed on his suspected associations and beliefs rather than on his professional and classroom competence or performance, and it stemmed from an investigation centering wholly on his expressions of opinion (see R. 30-38). Discharges of teachers from institutions of higher learning on these grounds lead to timid conformity among those who should, for a freely-thinking society, be leading and stimulating consideration of the novel and controversial.[2]

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[1] As to the potential scope of measures imposing disqualifications as the price of exercise of the privilege, consider the bill recently introduced in the California Legislature providing for the revocation of all licenses of business and professional persons licensed under the State Business and Professional Code in the event they exercise the privilege against self-incrimination in any inquiry into Communism or the advocacy of revolution. *Assembly Bill* (1955) No. 1903, introduced by Assemblyman Charles E. Chapel (defeated in Assembly Judiciary Committee, April 19, 1955). A recent New York bill, passed by one house of the Legislature, provided that any employee could be dismissed for invoking the Fifth Amendment in any hearing involving loyalty, notwithstanding the terms of a contract. New York Times, March 25, 1955, p. 16.

[2] Applicable here is Justice Frankfurter's comment on similar measures: "The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited publi-

And when the questioning concerns, as here, associations and opinions of over a decade ago, a resultant discharge is not only arbitrary to the individual, but means, from the standpoint of free expression, that professors will form and express their opinions under the inhibitory threat that they may have to justify themselves in the indefinite future by an unpredictable standard of rectitude.[3]

In placing emphasis on the deleterious effect on free expression of appellant's discharge, we are mindful of the fact that there is no basis for believing there is any current danger of "subversion" in the New York colleges; on the contrary, it has been authoritatively asserted that no problem of subversion is present.[4] The threat to civil liberties from the inhibition of free thought and inquiry is the present peril, and its intensification by the instant discharge contributes to the interest of *amicus*.

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service" (*Garner* v. *Los Angeles Board*, 341 U. S. 716, 728, concurring opinion). And see Justice Douglas: "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect" (*Adler* v. *Board of Education*, 342 U. S. 485, 510, dissenting opinion).

[3] See *Wieman* v. *Updegraff*, 344 U. S. 183, 191.

[4] Statement of Harry E. Gideonse, President of Brooklyn College, in program over Radio Station WMCA (Dorothy Dunbar Bromley, Moderator), November 24, 1954; and see Report of Commission to Investigate Communism and Un-American Teachings in New Jersey Schools (authorized by New Jersey State Legislature), May, 1953.

POINTS TO BE ARGUED

I. Appellee penalized appellant's exercise of the privilege against self-incrimination guaranteed to him by the Fifth Amendment. Appellee thus violated the protection intended by the Amendment and also the privileges and immunities clause of the Fourteenth Amendment.

II. The discharge of appellant and his permanent disqualification from city employment violated the due process clause of the Fourteenth Amendment.

Summary of Argument

I. The City Charter provision as here interpreted and applied imposes a direct and serious penalty on the exercise of the privilege against self-incrimination guaranteed by the Fifth Amendment for all Federal proceedings. Discharge from employment and permanent disqualification from all city employment as the price of invoking the privilege is a powerful coercion to surrender it and a gross interference with its free exercise. Not only was it the effect of the charter provision, as here interpreted, to force a sacrifice of the privilege and punish its exercise, but this was its very purpose.

The State's imposition of a penalty directly on the invocation of the Fifth Amendment privilege is a violation of the intended protection of the Amendment, for the Amendment could not have been intended to guarantee the privilege in Federal proceedings as against the Federal government, and leave it open to abridgement in such proceedings by the State. In penalizing the exercise of the Fifth Amendment privilege, the State also violated the privileges and immunities clause of the Fourteenth Amendment. Despite the narrowed scope of this clause this Court has repeatedly asserted that it protects those rights guar-

anteed to the citizen in relation to the national government by the Constitution. The Fifth Amendment privilege clearly is such a right.

The State's attempt to coerce surrender of the Fifth Amendment privilege by making its waiver a condition of public employment and penalizing its exercise by permanent proscription from public employment, is unconstitutional; the State can not use its power to condition public employment for an unconstitutional purpose. There can be no argument in this case for an exception to this Constitutional principle on the basis of the Government's need for power to conduct its employment relations efficiently, as would a private employer. For here the discharge and disqualification were outside the usual sphere of employment relations. They were not based on questioning by appellee or any agency with authority over appellant's employment. Further, the discharge was not based on any estimate of appellant's fitness, but was imposed purposefully as a punishment to force appellant to surrender his Federal privilege.

II. Appellant's discharge and permanent disqualification from city employment violates due process because it was wholly arbitrary and unreasonable. The question as to his possible membership in the Communist Party prior to 1941, which was the question he refused to answer, had only the most remote bearing on the present status of the Party or the schools, and was entirely inconsequential in view of appellant's willingness to answer questions as to all times since 1941. Furthermore, his discharge and permanent disqualification for this refusal lacked due process because he had no notice that he would be so penalized. Finally, appellant's discharge and disqualification is unreasonable because of the restraint its casts on freedom of association and the cognate freedoms of expression and thought, whose preservation especially in our colleges is an essential foundation of a free thinking society.

ARGUMENT

I. Appellee penalized appellant's exercise of the privilege against self-incrimination guaranteed to him by the Fifth Amendment. Appellee thus violated the protection intended by the Amendment and also the privilege and immunities clause of the Fourteenth Amendment.

Appellant refused to answer a question asked him by a committee of the United States Senate, claiming his privilege against self-incrimination under the Fifth Amendment to the Constitution. This claim was upheld as proper by the committee, and it did not press or coerce him in any way to answer the question (R. 30, 36-37). The highest court of New York, whose decision is here for review, assumed the Constitutional privilege was properly invoked before, and recognized by, the Senate committee (R. 53). It nevertheless held that the New York City charter provision that a city employee shall under certain circumstances be discharged and disqualified from any future elective or appointive city position for invoking the privilege against self-incrimination, applied to appellant (R. 57).

A. Coercive and Penal Effect of City Charter Provision, as Here Interpreted.

It needs no argument to demonstrate that discharge from employment and permanent disqualification from all city employment as the price of invoking the privilege against self-incrimination, is a powerful coercion to surrender it and a gross interference with its free and uninhibited exercise. It is as grave a penalty and as coercive in its effect indeed, in many circumstances more coercive—than fine and imprisonment. See *American Communications Association v. Douds*, 339 U. S. 382, 402: "Under some circumstances, indirect 'discouragements' undoubtedly have the same co-

coercive effect upon the exercise of First Amendment rights, as imprisonment, fines, injunctions or taxes." See also *United States* v. *Lovett*, 328 U. S. 303, 316; *Cummings* v. *Missouri*, 4 Wall. 277, 320. To appellant, who was employed in a City College as an Associate Professor of Literature and German and had been a college teacher for 27 years, winning many distinctions in that position, the extent of loss inflicted by the measure is apparent (see R. 31).

Not only is it the *effect* of the statute to coerce and interfere with the claim of the privilege, but its very intent and purpose is to force surrender of the privilege against self-incrimination, including, under the instant interpretation that guaranteed by the Fifth Amendment. For it cannot be argued that this statute looks to determining the fitness of employees as it might be if, for instance, a refusal to answer were treated as one clue or factor in determining the desirability of discharge. Here instead, a refusal to answer is a conclusive reason for discharge, though such a refusal cannot reasonably be deemed to show guilt even in regard to the subject of the question;[5] and here, moreover, discharge automatically follows a refusal to answer no matter how unimportant the question.

Finally, establishing beyond doubt that the charter section must be deemed a provision for forcing testimony and penalizing a refusal to answer, rather than a measure to eliminate unfit employees, is the provision that the employee is not only to be discharged, but is to be permanently disqualified from all city positions. This provision obviously has no relation at all to the employee's fitness for his present or for any particular position, or to the exigencies of the present or even of a foreseeable situation. See *United States* v. *Lovett*, 328 U. S. 303; *Bailey* v. *Richardson*, 182 F. (2d) 46, 54, 55 (C. A. D. C.), sustained by an equally divided court, 341 U. S. 918. In the latter case, where there was a three year bar from government

[5] See *Quinn* v. *United States*, 349 U. S. 155, 164, as to error of any assumption of guilt from invocation of the privilege.

service, as compared with the permanent bar in *Lovett*, the court said: "The Court in that case (Lovett) clearly held that permanent proscription from Government service is 'punishment' * * *. The difference between permanent and limited proscription is merely one of degree and not one of principal" (at pp. 54-55). In the instant case, the proscription was provided as a punishment for assertion of the privilege, to coerce its surrender, and makes unmistakable that punishment and coercion is the thrust of the section.

B. Intended Protection of the Fifth Amendment.

This interference by the State with the exercise of the Fifth Amendment privilege must be deemed a violation of the protection intended by the Amendment. The Fifth Amendment protects a person from being forced to incriminate himself for a Federal crime in a proceeding by the Federal government.[6] Here a penalty was directly imposed on exercise of the privilege, in order to force testimony in a Federal proceeding that might be self-incriminating as to a Federal crime. Certainly, the draftsmen did not intend to preserve the privilege in Federal proceedings from Federal, and leave it open to State, abridgement. Compare *United States* v. *Classic*, 313 U. S. 299, 315; *Terral* v. *Burke Constr. Co.*, 257 U. S. 529. The Fifth Amendment's grant of privilege is absolute, and can no more be transgressed as it was here by the State than it could be by the United States. See *Quinn* v. *United States*, 349 U. S. 155, 162: "Coequally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure'." Compare: *Hoffman* v. *United States*, 341 U. S. 479, 486; and see *Johnson* v. *United States*, 318 U. S. 189, 196-197.

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[6] The Fifth Amendment is construed "to confer immunity * * * in any federal inquiry where the information might be useful later to convict of a federal crime" *United States* v. *Kahriger*, 345 U. S. 22, 34 (Mr. Justice Jackson concurring); *Counselman* v. *Hitchcock*, 142 U. S. 547, 563.

C. Violation of Privileges and Immunities Clause.

It seems clear that the privilege against self-incrimination insured against the Federal government by the Fifth Amendment, is one of the privileges guaranteed against abridgement by the States by the Fourteenth Amendment. Time after time, despite this Court's narrowing of the scope of the privileges and immunities clause of the Fourteenth Amendment, it has asserted that the rights guaranteed by the Constitution to the citizen in relation to the national government are an essential segment of those privileges. The "privileges and immunities are that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." *Hague* v. *C.I.O.*, 307 U. S. 496, 519, note 1 (Opinion of Stone, C. J.). Semble: *Re Kemmler*, 136 U. S. 436, 448; *Twining* v. *United States*, 211 U. S. 78, 97.) And in the fountainhead case, the *Slaughterhouse Cases*, the Court both made this point and gave examples of the included rights, saying the privileges and immunities protected by the Fourteenth Amendment are those "which owe their existence to the Federal government, its national character, its Constitution, or its laws * * *. The rights to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution" (16 Wall. 36, 79).

The privilege against self-incrimination seems indistinguishable, for purposes of the Fourteenth Amendment, from those referred to in *Slaughterhouse*. It seems equally clear that New York's imposition of a serious penalty directly on the exercise of this privilege was an abridgement of it. Compare *Hague* v. *C.I.O.*, 307 U. S. at p. 513 (Opinion of Roberts, J.).[7]

[7] Appellee also violated the principle of Federal supremacy. In punishing appellant for exercising his Federal privilege, which Congress through its committee was according him freely with no threat of redress, the State negated a Federal right and interfered with Congressional performance of the Federal function of pro-

D. Invalidity of Conditioning Employment on Surrender of Privilege.

It is clear, then, that the privilege against self-incrimination in Federal proceedings for a Federal crime was insured to appellant against State coercion, interference, and punishment by the Fifth Amendment (Point B, supra) and the Fourteenth Amendment (Point C, supra). Here the coercion used by the State to attempt to force surrender of the privilege was the provision that appellant would be deprived of his job and of all City employment if he exercised it; the penalty for its exercise took the form of permanent deprivation of such employment. It is no longer disputable, under the decisions of this Court, that the State can not impose conditions on public employment for an unconstitutional purpose, any more than it can use other forms of coercion and punishment for an unconstitutional end.

As this Court said in *Frost v. Railroad Commission*, 271 U. S. 583, where the State imposed a condition on the grant of a permit to operate as an auto transportation company:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

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tecting and controlling exercise of a Federal privilege. Compare *Adams v. Maryland*, 347 U. S. 179; *In re Loney*, 134 U. S. 372; cf. *Pacific Coast Dairy Inc. v. Department of Agriculture of California*, 318 U. S. 285, 295. As to the Federal function of protecting a Constitutional right, see *United States v. Classic*, 313 U. S. 299, 314, 315.

And again, in ruling against a condition attached by a State to a foreign corporation's license to do business, this Court said: "The principle * * * is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts * * *. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." (*Terral* v. *Burke Constr. Co.*, 257 U. S. 529, 532-533.)[8]

It is apparent that the choice the State gave here, between surrender of employment and surrender of a constitutional right may be as coercive as if it imposed "imprisonment, fines, injunctions, or taxes" as the price of exercising the right. See *American Communications Association* v. *Douds*, 339 U. S. 382, 409. In the *Douds* case, the condition in issue was attached to the privilege of using

[8] See also *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571; *Hanneğan* v. *Esquire*, 327 U. S. 146, 156; *Marsh* v. *Alabama*, 326 U. S. 501, 504; *Jamison* v. *Texas*, 318 U. S. 413, 415; *Mo. ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349; and see *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430-1 (Brandeis dissenting), respecting the denial of mailing privileges.

The McAuliffe dictum (quoted by the State court, R. 55) may only have meant, and can be reconciled with the decisions of this Court on the basis, that the conditions in issue appeared to bear a reasonable relation to fitness and efficiency and thus accorded with constitutional standards for such regulations. In any event, compare with *McAuliffe*, Justice Holmes' opinion in *Burleson*, 255 U. S. at p. 437, and see Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938), p. 57, commenting that Mr. Justice Holmes' view in *Burleson* "brushed away this web of unreality" of "treating postal facilities as a privilege."

the facilities of a Federal agency, the National Labor Relations Board. While the condition was upheld, it was upheld only because the regulation met constitutional standards, with full recognition by this Court that the Government was bound by the Constitution when it used conditioning of a privilege as the method of enforcing a regulation. And this Court made clear in *Douds* that its reasoning was fully applicable to the denial of public employment, and that the Government could not use this lever to curtail the exercise of Constitutional rights. See *Douds*, 339 U. S. at p. 405, where the Court said, in discussing its preceding *Mitchell* decision, that that "decision was not put upon the grounds that government employment is a privilege to be conferred or withheld at will." See *United Public Workers v. Mitchell*, 330 U. S. 75, 100.

Finally, in *Wieman v. Updegraff*, 344 U. S. 183, 191-192, this Court firmly established that in public employment as in its other exercises of public power, the State is bound by the constitutional guarantees.

In the foregoing cases, the Constitutional right in issue, which the Government could not diminish by conditioning a privilege on its sacrifice, was in effect the right to "reasonable" treatment. In the case at bar, the right the State attempted to curtail by conditioning is more definite and absolute, like the right in the *Terral* case. The right insured by the Fifth Amendment and in turn by the Fourteenth Amendment's privileges and immunities clause is not merely a right to be free from compulsory self-incrimination in Federal proceedings when it seems "reasonable" to be free, but the right to be free from this compulsion regardless of circumstances. Accordingly, there is no question here of whether the State might or might not have had some purported justification for its condition; the Fifth Amendment right of which it sought to deprive appellant is not subject to modification. It was therefore a violation of the Fifth and Fourteenth Amendments for the

State to attempt to deprive appellant of the Federal privilege against self-incrimination by making its surrender a condition of employment.[9]

The argument sometimes heard that there must be a special exception to the usual principles of constitutionality to permit the State to function as efficiently in its employment relations as would a private employer, is entirely inapplicable to this case. For the City charter provision as here applied is entirely outside the usual sphere of employer-employee relations. The question from which appellant's discharge arose was not posed by appellee nor by any agency with any authority over appellant's employment—indeed, the questioning was not by a State agency at all. Further, as already pointed out (supra, pp. 7-8), the provision is not directed at appraising the fitness of employees, but is a penalty and coercion for the purpose of adducing evidence for Governmental use either in a Governmental investigation or in a prosecution or both.

[9] While we submit that the foregoing reasoning is a sufficient ground for reversal of the judgment below, we shall also show that the Charter's condition on public employment as here interpreted and applied had no reasonable justification (infra, Point II).

II. The discharge of appellant and his permanent disqualification from city employment violates the due process clause of the Fourteenth Amendment.

Like any arbitrary State act, an arbitrary and unreasonable provision for discharge from public employment violates due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192; cf. *Mitchell* v. *United States Public Workers*, 330 U. S. 75. In the case of the City charter provision as here applied, the requirement of reasonableness must be underlined. For, in addition to discharge and the stigma inevitably attached to it because of its connection with an investigation of "subversion",[10] the drastic and extraordinary penalty of permanent disqualification from City employment[11] is also imposed.

It is highly unreasonable and arbitrary for New York to attach these penalties to the conduct covered by the City charter, as it was here interpreted and applied. For these penalties are to be imposed, according to the New York court's interpretation, no matter how unimportant the subject matter of the investigation or of the particular question on which answer is refused, and no matter by whom the investigation is conducted or how unrelated to the interests of the State.[12] Under the instant interpretation, though the refusal to answer well may be in no way injurious to the State, the City charter prescribes a flat,

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[10] Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 139, 141, 142-3, 160-161, 175-180, 187; *Wieman*, at p. 191; compare *Shurtleff* v. *United States*, 189 U. S. 311, 317.

[11] See *Bailey* v. *Richardson*, 182 F. 2d 46, 54, 55 (C. A. D. C.), sustained 341 U. S. 918.

[12] If the penalty were attached only to investigations and hearings authorized by the State or City, there might at least be some ground for assuming that they were vital to the State's interest, or even that questions would be propounded with the charter provision in mind to avoid the discharge and disqualification of employees for a refusal to answer questions of little significance to the State.

unvarying, and drastic penalty, that is "wholly disproportioned to the offense."[13]

In appellant's case, the application of the statute is clearly arbitrary. The record shows that he was willing to answer all questions about the present or the decade preceding the hearing, and that he only refused to answer whether he was a member of the Communist Party prior to 1941 (R. 30, 32). The extreme remoteness of this question to the present status of the Party or the schools is clear. Not only is there the obvious time interval,[14] but this Court must know what is generally known and uncontroverted—that membership in the Communist Party in the United States has so diminished and changed in the last decade that information as to Communist activity before 1941 would have at best only scant bearing on present membership. Here the refusal to answer the question was particularly inconsequential in view of appellant's willingness to answer questions as to the present and recent times. Thus, the harshness, vindictiveness, and complete unreasonableness of imposing the penalty of discharge and, in addition, permanent disqualification, on appellant is apparent.

No Evidence of Unfitness.

While, as we have emphasized, the purpose of the charter section is to provide a penalty as a means forcing testimony rather than to set up a standard of fitness for employees, we may note, as further indicating the unreasonableness of the discharge, that it would be impossible to consider appellant unfit because of his refusal to answer. Clearly it cannot be assumed from appellant's refusal to answer

[13] *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 66. See *St. Louis, I. Mt. & So. Ry. v. Wynne*, 224 U. S. 354, 359-360; *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U. S. 86, 111-112.

[14] Cf. *Bowers v. United States*, 202 F. 2d 447, 449 (C. A. D. C.).

that he was in fact a Communist Party member in 1941.[15] But if, *arguendo*, it were assumed appellant was a Communist Party member in the year about which he declined to answer, an association with the Party that was discontinued in 1941 could not with reason be deemed to show unfitness to teach in 1954, particularly in view of the great possibility that a member at that time had no knowledge of the character of the Party as now perceived.[16] Most especially is this true of a person like appellant who is willing to testify freely as to the subsequent period and whose bona fides can thus be examined.

There was of course no hint or suggestion that appellant has acted immorally, subversively, or incompetently in his position as a German and Literature professor or was other than a noted scholar.

No Warning of Punishment.

The discharge and disqualification are additionally unreasonable because there was no indication or warning that a question on long-past membership in the Communist Party would be deemed a question on "official conduct" within the meaning of the charter (see dissenting opinion in State court, R. 64). Appellant had no basis for assuming the question would be so considered. For there had been, and is, no hint that the suspected membership was in any way connected with appellant's performance as a German and Literature Professor; furthermore, the investigation was being conducted by an arm of the Federal government which

[15] See *Quinn v. United States*, 349 U. S. at p. 164, where the Court speaks of those who "wrongly conceive of it (the privilege) as merely a shield for the guilty."

A person's refusal may be motivated in part by the fear that any information he gives will be used in aid of a prosecution against him though he is in fact guiltless; or that he will be subjected to unjustified perjury charges on the basis of evidence given the committee by informers if he truthfully denies membership; or that he will be forced to give information damaging to others though he believes them innocent.

[16] See *Wieman*, 344 U. S. at p. 190

presumably was not concerned with local problems (Cf. R. 16-18). In short, appellant had no warning from the vague terms of the charter or the nature of the question that his refusal to answer jeopardized his job. He was therefore subjected to a basic deprivation of due process in that a serious loss was inflicted on him without notice and without opportunity to make the choice of avoiding it.[17]

Effect on Freedom of Expression and Association.

Finally, the effect of appellant's discharge on freedom of association must be weighed in the balance in considering the due process guarantee (consider *Wieman*, 344 U. S. at p. 191). Certainly a person's discharge and permanent disqualification on the basis of a refusal to answer as to possible associations over a decade before, casts a serious restraint on freedom of association. Such an after-the-fact penalization is a threat that any non-conformist association may years later become the source of a penalty, and all but clearly conformist associations are discouraged.[18] And freedom of inquiry cannot flourish in our colleges, which should be a major seeding ground for free opinion, if the faculty is afflicted with the timidity borne of discharges such as appellant's, grounded on suspected long-past association and intellectual deviation (see R. 31-38, as to appel-

[17] See *Jordan* v. *de George*, 341 U. S. 223, 230-231. Cf. *Johnson* v. *United States*, 318 U. S. 189, 196-197.

[18] Speaking of penalizing past associations that may have been innocent and its effect on freedom of association today, this Court said: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman*, 344 U. S. at p. 191. It acts as a "real deterrent to people contemplating even innocent associations." *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part). The teacher in this situation "will tend to shrink from any association that stirs controversy." *Adler* v. *Board of Education*, 342 U. S. 485, at p. 509 (Douglas, J., dissenting).

lant's suspected activity.[19] Assuming the State's interest in protecting children in the lower grades from subtle influences towards disapproved viewpoints,[20] and assuming sacrifice of a free spirit may be reasonable to there achieve such protection, in institutions of higher learning both the State's interest in protection is the less and the importance of free inquiry is the greater.

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[19] Limitation on a teacher's right of association results in "inhibition of freedom of thought, and of action upon thought. * * * Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. * * * It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens. Teachers * * * must be exemplars of open-mindedness and free inquiry." *Wieman*, 344 U. S. at pp. 195-196 (Frankfurter, J., concurring). "Liberty of thought soon shrivels without freedom of expression." *Dennis* v. *United States*, 341 U. S. 494, 550 (Frankfurter, J., concurring). The rights of assembly and of speech and press are "cognate" (*De Jonge* v. *Oregon*, 299 U. S. 353, 366) and "inseparable" (*Thomas* v. *Collins*, 325 U. S. 516, 530-31).

[20] See *Adler* v. *Board of Education*, 342 U. S. 485, concerning the lower grades. This Court has not yet considered the question of the discharge of teachers in institutions of higher learning for their associations and beliefs, except in the *Wieman* case where the discharges were invalidated.

CONCLUSION

The judgment below should be reversed. Section 903 of the New York City Charter was here interpreted as requiring appellant's discharge for exercising his Federal privilege, guaranteed by the Constitution, in a proceeding conducted by an arm of the Federal government, having no connection with or authority over appellant's employment. This interpretation and application of the City charter and appellant's consequent discharge from appellee's employ and disqualification from all New York City employment, should be held unconstitutional.

Respectfully submitted.

Osmond K. Fraenkel

Osmond K. Fraenkel,
Emanuel Redfield,
Nanette Dembitz,
Counsel for New York Civil Liberties Union, amicus curiae.

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